



Monarch Developers Limited v Bank of Baroda [Kenya] Limited (Environment & Land Case E106 of 2022) [2023] KEELC 21935 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E106 OF 2022
JO MBOYA, J
NOVEMBER 30, 2023**

BETWEEN

MONARCH DEVELOPERS LIMITED PLAINTIFF

AND

BANK OF BARODA [KENYA] LIMITED DEFENDANT

RULING

Introduction and Background

1. The Plaintiff herein approached the Honorable Court vide Plaint dated the 21st March 2022; and wherein same have sought for a plethora of reliefs, inter-alia;[verbatim]:
 - i. A Declaration that the Defendant's exercise of its power of sale by Chargee is irregular and unlawful and has the effect of hindering and infringing the Plaintiff's Equitable Right of Redemption;
 - ii. A Declaration that the amount of Interest levied by the Defendant on the Plaintiff's Loan facilities is contrary to the express provisions of Section 44A of the *Banking Act*, [Cap. 488] of the Laws of Kenya;
 - iii. A Permanent order of Injunction directed at the Defendant restraining the Defendant whether by itself, its agents, servants, agents and or employees howsoever from commencing, continuing, proceeding with any statutory sale of all that property known as Land Reference Number 209/21739 (Original No. 209/17/4) Nairobi;
 - iv. General damages.
2. Simultaneously with the filing of the Plaint, the Plaintiff herein took out and filed a Notice of Motion Application dated the 21st March 2022; and in respect of which same sought for various reliefs relating



to and concerning the preservation of Land Reference Number 209/21739 (Original No. 209/17/4) Nairobi.

3. Suffice to point out that the Application filed by and on behalf of the Applicant was thereafter canvassed before Hon Justice Angote, Judge; who eventually rendered and/or delivered his considered ruling on the 22nd June 2023. For coherence, the Learned Judge dismissed the Application for Temporary injunction.
4. On the 1st November 2023; Hon Justice Angote, Judge, ordered and or directed that the instant file be placed before this Honourable for further directions and hearing of the main suit. Consequently and in this regard, the file was eventually placed before this Court on the 21st November 2023.
5. Instructively, when the file was placed before this Honourable court on the 21st November 2023, this court highlighted and pointed out to the advocate for the respective Parties that there was an apparent question pertaining to the Jurisdiction of the Environment and Land court to entertain and adjudicate upon the subject dispute.
6. Arising from the foregoing, the Honourable court ordered and directed the Parties to file and exchange written submissions pertaining to and concerning the question of Jurisdiction of the Environment and Land court, taking into account the holding of the Court of Appeal in the case of Co-operative Bank of Kenya Ltd versus Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR9; which adverted to the question of Jurisdiction.

Parties' Submissions:

Plaintiff's Submissions:

7. The Plaintiff herein filed written submissions and has highlighted two [2] salient and pertinent issues for due consideration by the Honourable court.
8. Firstly, Learned counsel for the Plaintiff has submitted that the Jurisdiction of a court is derived from *the Constitution*, the Statute or both. Further and in any event, Learned counsel for the Plaintiff has contended that where a court is devoid and divested of the requisite Jurisdiction; then such a court cannot entertain and adjudicate upon the impugned dispute.
9. In support of the contention that the Jurisdiction of a court is derived from *the Constitution* or the constitutive charter, Learned counsel for the Plaintiff has cited and relied, inter-alia, the case of Owners of Motor Vessel "Lillian" S vs Caltex Oil (K) Ltd (1989)eKLR and Samuel Kamau Macharia & Another vs Kenya Commercial bank Ltd & 2 Others (2012)eKLR, respectively.
10. Having cited the foregoing decision, Learned counsel for the Plaintiff has thereafter proceeded to and contended that the issue pertaining to charges and mortgages fall within the Jurisdiction of the Environment and Land court and not otherwise. In this regard, Learned counsel has cited and relied in the provisions of Section 13(2) and (7) of the *Environment and land Court Act*, 2011.
11. Furthermore, Learned counsel has ventured forward and submitted that the provisions of Section 150 of the *Land Act*, 2012 [2016] also confers and vests Jurisdiction on the Environment and Land Court, to deal with all the disputes and/or matters arising out of the *Land Act*, 2012(2016).
12. On the other hand, Learned counsel for the Plaintiff has further submitted that the People of the Republic of Kenya conscientiously and deliberately voted for *the Constitution* 2010; and in particular, paid due importance to the establishment of the specialized courts, inter-alia, the Environment and Land Court.



13. Having made the foregoing submissions, Learned counsel for the Plaintiff has thereafter contended that a Legal charge fits within the definition of a dispute which falls within the Jurisdiction of the Environment and land Court and not otherwise.
14. Based on the foregoing, Learned counsel for the Plaintiff has therefore invited this court to independently appraise and evaluate the various provisions of the law, inter-alia, Sections 13(1), (2) and (7) of The *Environment and Land Court Act*, 2011; Section 2 and 150 of the *Land Act*, 2012 and Section 101 of the *Land Registration Act*, 2012, respectively and thereafter, to form an objective position based on the pure interpretation of the Law.
15. Secondly, Learned counsel has submitted that though the Court of Appeal found and held that issues pertaining to charges and mortgages and by extension the exercise of the statutory power of sale do not fall within the Jurisdiction of the Environment and Land Court, the said decision was erroneous and did not take into account the relevant and applicable provisions of the law. Simply put, Learned Counsel for the Plaintiff has contended that the said decision was reached per incuriam.
16. Additionally, Learned counsel for the Plaintiff has contended that insofar as the Court of Appeal did not take into account the relevant provisions of the law, the decision made in the case of Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017)Eklr; therefore ought to be overturned and overruled by this Honourable court.
17. To be able to understand the substratum of the submissions by the Learned Counsel for Plaintiff, it is appropriate and imperative to reproduce Paragraphs 45, 46 and 51 of the written submissions.
18. Same are reproduced as hereunder;

Paragraph 45

By virtue of the court of appeal decision in Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR, the environment and land court has been stripped of its lawful jurisdiction to hear and determine the suit herein based on the nature of the reliefs sought by the Plaintiff dated the 21st March 2022. We however submit that this honorable court can, and is certainly called upon to overrule the said court of appeal decision as stipulated herein below.

Paragraph 46

In order to adopt the finding in Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR, this court must carefully evaluate the facts of both the court of appeal decision and those of the instant matter and undertake an independent interpretation of *the constitution* and/or the applicable statutory provisions before rendering itself bound by the court of appeals precedent. On the other hand, this court can, in appropriate circumstances, depart from, overrule or overturn its earlier decisions which is a power of a court sanctioned by *the constitution* if convicted of the manifest error of the previous decisions.

Paragraph 51

However, the reasoning used by the court of appeal in rendering its decision as such is per incuriam. The decision of the court of appeal in Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR was reached due to a lack of due regard to the law and the facts in issue. We submit further and on the same in the terms hereunder;



19. From the excerpts which have been reproduced hereinbefore, Learned counsel for the Plaintiff has thus invited this Honourable court, to proceed and distinguish the decision by the Court of Appeal and furthermore, to overrule same.
20. To support her submissions, Learned counsel for the Plaintiff has thereafter cited and quoted, inter-alia, the case of Dothia vs National and Greenlays Bank Ltd & Another (1970)EA 195, Jasbir Singh Rai & 3 Others vs Tarlochand Singh Rai & 4 Others (2013)eKLR, Republic vs Karisa Chengo & 2 Others (2017)eKLR and Kirir Cotton Company vs Hodass Devani (1958)EA 239, respectively.
21. In a nutshell, whilst acknowledging that the issues raised at the foot of the instant suit touch on and/or concern computation of Interests and the exercise of statutory power of sale by the Defendant, Learned counsel for the Plaintiff has nevertheless invited the court to proceed and hold that same is seized of the requisite Jurisdiction to entertain the instant suit.

Defendant's Submissions:

22. Learned counsel for the Defendant filed written submissions dated the 29th November 2023; and same has raised, highlighted and canvassed one [1] pertinent issues for consideration by the Honourable court.
23. According to Learned counsel for the Defendant, the dispute before this Honourable court touches on and concerns, inter-alia, whether or not the Defendant has levied and charged interests on the Banking facility granted to the Plaintiff contrary to and in contravention of the provisions of Section 44A of the *Banking Act*, Chapter 488 Laws of Kenya; and whether the Defendant is exercising her statutory power of sale irregularly and unlawfully, with a view to infringing upon the Plaintiff equitable rights of redemption.
24. Having pointed out the nature of the reliefs that are being sought by and on behalf of the Plaintiff herein, Learned counsel for the Defendant has thereafter ventured forward and submitted that the issues raised at the foot of the instant suit do not fall within the Jurisdiction of the Environment and Land court or at all.
25. Furthermore, Learned counsel for the Defendant has submitted that the issues that color the Plaintiff filed by and on behalf of the Plaintiff herein are of a Commercial nature and thus rightfully belong to and falls within the Jurisdiction of the High Court of Kenya by dint of the Provisions of Article 165 f *the Constitution*, 2010.
26. To this end, Learned counsel for the Defendant has cited and quoted, inter-alia, the case of Co-operative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR and Diamond Trust Bank of Kenya Ltd vs Fatuma Hassan Hadi Malindi Civil Appeal No. 18 of 2020 (UR), wherein the Court of Appeal had occasion to speak to the Jurisdiction of the Environment and Land court, as far as the Computation of Interests; and exercise of statutory power of sale is concerned.
27. Secondly, Learned counsel for the Defendant has equally submitted that Jurisdiction is a threshold question and that where a court is divested of the requisite Jurisdiction, then it behooves the court to strike out the impugned matter and thereafter to down her tools.
28. Whilst underscoring the import and tenor of Jurisdiction, Learned counsel for the Defendant has cited and relied on, inter-alia, the case of Owners of Motor Vessel Lilian S vs Caltex Oil Kenya Ltd (1989)eKLR and S.K Macharia vs Kenya Commercial Bank Ltd (2012)eKLR, respectively.



29. Arising from the foregoing, Learned counsel for the Defendant has thereafter implored the Honourable court to find and hold that same (court) is divested of the requisite Jurisdiction and hence ought to down her tools.

Issues For Determination:

30. Having appraised the Plaint dated the 21st March 2022; and upon taking into account the rivaling submissions filed by and on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;
- i. Whether the Honorable Court is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the issues at the foot of the instant Suit/ Matter.
 - ii. If the answer to issue number (i) herein is in the negative, what Reliefs ought to be granted.

Analysis And Determination:

Issue Number 1

Whether the Honorable Court is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the issues at the foot of the instant Suit/ Matter.

31. Before venturing to analyze and address whether or not this Honorable court is seized of the requisite Jurisdiction to entertain the subject dispute, it is imperative to discern what Jurisdiction denotes and the implications same has in a particular matter placed before the court.
32. To start with, there is no gainsaying that Jurisdiction is the authority which a Court of law has to entertain and adjudicate upon matters that are placed before same, or to take cognizance of matters presented in a formal way from its decision. Notably, the Jurisdiction of a court can be unlimited or otherwise.
33. Further and in any event, the significance of Jurisdiction of a court was illuminated and underscored in the case of Owners of Motor Vessel Lilian S vs Caltex Oil Ltd (1989)eKLR where the Court of Appeal held and stated thus;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.

Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



34. Similarly, the meaning, import and tenor of what denotes Jurisdiction was re-visited by the Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR, where the Court of Appeal stated and observed as hereunder;
- “ 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context”.
35. From the foregoing decisions, [which have been quoted in the preceding paragraphs], the golden thread that cuts across and is otherwise discernable, is to the effect that a court must ascertain whether or not same is seized of the requisite Jurisdiction at the onset and if the court comes to the conclusion that the same is devoid of Jurisdiction, then it behooves the court to down its tools at the earliest.
36. Furthermore, it is also evident that if a court divested of Jurisdiction proceeds to and entertains a suit for which same has no Jurisdiction, then the proceedings of the court and the resultant orders, if any, are a nullity ab initio.
37. Taking the foregoing into account, it is now appropriate to revert back to the instant matter and to discern whether the issues at the foot of the Complaint, filed by and on behalf of the Plaintiff, falls within the Jurisdiction of this court, or otherwise.
38. Suffice it to point out that the issues which have been highlighted and amplified at the foot of the Complaint dated the 21st March 2022; touch on and/or concern the lLvying of interests by the Defendant on the banking facility which was granted to the Plaintiff herein; and the exercise of the chargee’s statutory power of sale.
39. According to the Plaintiff, it is contended that the Defendant herein has proceeded to and charged interests contrary to and in contravention of the provisions of Section 44A of the Banking Act, Chapter 488 Laws of Kenya.
40. Other than the foregoing, the Plaintiff has also contended that the Defendant herein is seeking to exercise her statutory power of sale [Right of foreclosure], in an irregular and unlawful manner, in a bid to fetter the Plaintiff’s Equity of redemption.
41. Based on the foregoing contentions, the Plaintiff has thereafter implored the Honourable court to proclaim that the impugned actions by the Defendant are unlawful and illegal and thereafter to make appropriate declarations.
42. It is common ground that the issues at the center of the dispute herein touches on and/or concerns a charge, which was entered into and executed in favor of the Defendant and which anchors, inter-alia, the Defendant’s exercise of statutory power of sale.



43. To the extent that the question before the Honourable court touches on and concerns inter-alia, computation and levying of interests; and exercise of statutory power of sale, it is apparent that the substratum of the dispute is of a Commercial nature and thus ought to have been filed before the High Court; and not the Environment and Land court.
44. To this end, it is instructive to take cognizance of the holding by the Court of Appeal in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR, where the court held thus;
- “ 36. By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use.
- The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.
38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.
45. Furthermore, the Court proceeded and held thus;
42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions.
46. Other than the decision in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR, the Court of Appeal re-visited the question of Jurisdiction of the Environment and Land court as pertains to matters concerning the exercise of statutory power of sale



and re-affirmed its previous position, wherein same held that such Jurisdiction inheres in the High Court.

47. For coherence, the re-visitation alluded to in the preceding paragraph was illuminated in the case of Diamond Trust Bank Kenya Limited versus Fatma Hassan Hadi; Mombasa Civil Appeal No. 18 of 2020; [Unreported], where the court stated as hereunder;

“In the present case, although the Respondent is not privy to the instrument of the legal charge, there is no doubt that what the Respondent is seeking before the ELC is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in Co-Operative Bank of Kenya Limited vs. Patrick Kang’ethe Njuguna & 5 others (above), is a commercial matter for adjudication before the High Court. In our view therefore, the judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.

48. Arising from the ratio decidendi, elaborated upon at the foot of the two decisions, [which have been alluded to hereinbefore], there is no gainsaying that issues pertaining to charges, computation and levying of interests; as well as the exercise of the statutory power of sale, do not fall within the requisite Jurisdiction of the Environment and Land court.
49. Consequently and in the premises, it is my humble finding and holding that the issues that underpin the suit beforehand falls outside the purview of the Jurisdiction of this court and hence the instant suit ought not to have been filed before the Environment and Land court in the first place.
50. Before departing from the issues herein, there is one issue that merits mention and a short address. Inevitably, the issue that merits mention relates to the contention by Learned counsel for the Plaintiff that this Honorable court is seized of the requisite mandate and or authority to overturn and/or overrule the decision of the Court of Appeal in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR.
51. Whereas the submissions by Learned counsel, [details in terms of the preceding paragraph sound attractive], it is not lost on this Honourable court that the Court of Appeal is a higher tier court and by virtue of its Constitutional position, her decisions are binding on this court, unless there be a decision of the Supreme Court of Kenya, which by dint of Article 163(7) of *the Constitution*, 2010, binds all the lower tier courts.
52. Other than the foregoing, it is also worthy to draw the attention of Learned counsel for the Plaintiff to the established and hackneyed Doctrine of stare decisis, whose import and tenor is, inter-alia, that courts of a lower cadre ought to respect and offer deference to decision rendered by a Superior court of Higher tier, inter-alia, the Court of Appeal and the Supreme Court, respectively.
53. To underscore the significance of the Doctrine of state decisis, it suffices to adopt, re-state and reiterate the holding of the Supreme Court in the case of Jasbir Singh Rai & 3 others versus Tarlochan Singh Rai Estate of & 4 others [2013] eKLR, where the court held as hereunder;

“(49) It is right, therefore, that in the submissions before this Court, none of the counsel urged that it was not possible to depart from our previous decision. Counsel, as we understood it, no more than underlined the need for fidelity to the principle of stare decisis, while urging that only in the most exceptional circumstances, should there be a departure from this principle.



[50] For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law.

(51) Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. This position is illustrated by the English House of Lords judgment in *Cassell & Company Limited v. Broome* [1972] 2 WLR 645, in which the Court of Appeal’s perception of *Rookes v. Barnard* [1964] AC 1129 as being per incuriam was the subject. The relevant passage (per Lord Reid) reads:

“I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided per incuriam, or “unworkable,” they really only meant that they did not agree with it....

“When this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the judges and text-book writers whose divergent or confusing expressions led to the necessity for the investigation.”

54. Remarkably, the importance of the Doctrine of stare decisis was again highlighted by the Supreme Court of Kenya in the case of *Geoffrey Makana Asanyo & 3 Others versus The Honorable Attorney General* (2020)eKLR, where the court stated thus;

(27) In *Kidero & 5 Others v. Waititu and Others*, Sup. Ct. Petition No. 18 of 2014(Consolidated with Petition No. 20 of 2014), Njoki Ndungu, SCJ, in her concurring opinion, made the following pertinent remarks (para. 236):

“The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court’s vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the



lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms.”

- (28) In *Dodhia v National & Grindlays Bank Limited and Another* [1970] EA 195, Duffus, V.P. expounded the principle of stare decisis stating that;

“The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State.”

- (29) We had thus recounted in another case, *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* Supreme Court Petition No. 4 of 2012, [2013] eKLR,

“Adherence to precedent should be the rule and not the exception; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

- [30] We may draw from the comparative lesson: in Canada, the importance of the principle was clearly articulated by Laskin, J.A. of the Ontario Court of Appeal in *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2008), 244 O.A.C. 151 (CA);2008 ONCA 703, in the following terms:

“[t]he values underlying...stare decisis are well known: consistency, certainty, predictability, and sound judicial administration. Adherence to precedent promotes these values...Adherence to precedent also enhances the legitimacy and acceptability of judge-made law and by so doing enhances the appearance of justice.



Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case.”

(31) In another case, the Canadian Supreme Court reiterated the principles it will apply in determining whether to overrule one of its own prior decisions, and affirmed that lower Courts are bound to follow decisions of the Supreme Court, regardless of their views as to the correctness of those decisions (Canada v. Craig, 2012 SCC 43 of 1 August 2012).

55. Arising from the foregoing, it is common knowledge that the Doctrine of stare decisis is binding on courts of lower tier and thus it is absurd for Learned counsel for the Plaintiff to proceed and be heard to invite this Honourable court to overrule and/or overturn the decision of a Court of Appeal.
56. Invariably, if such a situation were to occur, then the Rule of Law and constitutionalism, would have been thrown out of the Window; and replaced by the Rule of the Jungle, where everyone would act as same pleases, without due regard, to the established principles and positions of the Law.
57. Simply put, this Honourable court is not prepared to partake of and/or act upon the dangerous invitation by Learned counsel for the Plaintiff. Consequently and in this regard, the invitation to overturn the decision of the Court of Appeal, is declined.

Issue Number 2

If the answer to issue number (i) herein is in the negative, what reliefs ought to be granted.

58. Having found and held that the issues at the foot of the instant suit do not fall within the Jurisdictional mandate of this court, namely, [the Environment and Land Court] the next question that merits highlighting and appropriate determination is what next. Simply put, what does a Court faced with a situation do?
59. Nevertheless and to my mind, where a suit is filed and/or mounted in a court without the requisite Jurisdiction, such a suit, is a nullity ab initio and thus same is incapable of being transferred to (sic) such other court seized of Jurisdiction.
60. Further and in any event, even Learned counsel for the Plaintiff herein conceded that a suit filed before a court without Jurisdiction is a nullity and amounts to nothing. Consequently and in this regard, such a suit is dead and cannot be imbued with life in any manner whatsoever, including by way of transfer of same.
61. Instructively, the legal position as pertains to whether or not a suit filed in a court without Jurisdiction can be transferred is well beaten and hackneyed. In this respect, it suffices to cite and adopt the holding of the Supreme Court of Kenya, in the case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, where the court stated as hereunder;

(154) However, as it was well elucidated in the case of Kagenyi v Musiramo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.



62. Similarly, the position that a suit filed before a court without Jurisdiction cannot be transferred to (sic) a court with Jurisdiction was also highlighted by the Court of Appeal in the case of Equity Bank Limited versus Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

63. Quiet clearly, where a suit is filed before a court without Jurisdiction, such a suit is a nullity and is thus incapable of redemption, either by way of transfer or otherwise. Consequently and in this respect, the options that are available to this court do not therefore include (sic) transfer of the suit, whatsoever.

64. In a nutshell, my answer to issue number two [2] is to the effect that the suit beforehand can only be struck out and not otherwise.

Final Disposition:

65. Having calibrated on the thematic issues, [which were enumerated in the body of the Ruling herein], it must have become crystal clear that the suit beforehand was mounted before a court that was/is devoid of the requisite Jurisdiction to entertain and/or adjudicate upon same.

66. In view of the foregoing, this Honourable court comes to the conclusion that the suit vide Plaint dated the 21st March 2022, is void and thus a nullity ab initio. Consequently, same be and is hereby struck out with costs to the Defendant.

67. For coherence, such costs shall be agreed upon; and in default of such agreement, same to be taxed by the Deputy Registrar of the court in the usual manner.

68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS __30TH__ DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. Asava b/b for Mr. Busaidiy for the Plaintiff.

Mr. James Gathaiya for the Defendant.

